

The Planning Board for the Town of Derry held a public meeting on Wednesday, September 18, 2013, at 7:00 p.m., at the Derry Municipal Center (3rd Floor Meeting Room) located at 14 Manning Street in Derry, New Hampshire.

Members present: David Granese, Chairman; Frank Bartkiewicz, Secretary; John O'Connor, Vice Chairman; Randy Chase, Administrator's Designee; Jan Choiniere (7:29 p.m.), Darrell Park, Ann Marie Alongi Members; Frank Mazzuchelli and Lori Davison, Alternates

Absent: Jim MacEachern, Al Dimmock

Also present: George Sioras, Planning Director; Elizabeth Robidoux, Planning Clerk

Mr. Granese called the meeting to order at 7:05 p.m. The meeting began with a salute to the flag. Mr. Granese then introduced the staff and Board members present, and noted the location of the exits, and meeting materials.

*Mr. Mazzuchelli was seated for Mr. MacEachern
Ms. Davison was seated for Mrs. Choiniere*

Escrow

None.

Minutes

The Board reviewed the minutes of the August 21, 2013, meeting.

Motion by O'Connor, seconded by Bartkiewicz to accept the minutes of the August 21, 2013, meeting as written. The motion passed with O'Connor and Park abstained.

Correspondence

Mr. Bartkiewicz advised the Board has been copied on a reminder letter sent to JEMCO Builder and Developer advising their escrow for the Deer Run subdivision will expire on October 31, 2013. The Board has also received an updated list of the Change in Use applications which do not come before the Board. The most recent additions are a dental office at 19 Manchester Road; a machine shop at 7 Tinkham Avenue; Auto Advantage of Derry at 172 Rockingham Road; Superior Auto Sales at 34 Pinkerton Street; Derry Kang's Kitchen at 55 Crystal Avenue; Left Tees Designs at 13 West Broadway; From the Barrell Brewing Company at 127 Rockingham Road and Wicked Good Pizzeria at 10 Manchester Road. The Board has received a letter from John O'Connor that will not be read into the record at this time, but will be placed in the record.

NH DOT has forwarded a notice regarding a series of public hearings which will be held on the 10 Year Highway Plan. Mr. O'Connor added that if anyone is interested in Exit 4A, it will be on the agenda. Mr. Sioras noted that one of the hearings will be held at the Municipal Center on September 25, 2013 beginning at 7:00 p.m. Commissioner Clements and Councilor Sununu will be in attendance to talk about transportation projects. For example, funding was provided for the proposed light at the intersection of Kilrea and Windham Depot Road. The Route 93 widening, bike trails and Exit 4A could be topics of discussion. Comments are put on record and suggestions for projects are considered.

Mr. O'Connor asked if the analysis of the intersection at English Range Road near the Fire Station had been completed? Mr. Sioras advised SNHPC looked at that intersection and staff has recommended the installation of a permanent light at that intersection. Another intersection that has been recommended for funding is the intersection of Route 28 and Lawrence Road near the General Stark store.

Southern New Hampshire Planning Commission has sent its monthly update of activities. Mr. Bartkiewicz advised the Board has received the latest edition of *Town and City*.

Additionally, the Board has received the following correspondence related to the approval of the Dumpster Depot site plan. Mr. Bartkiewicz read the following into the record.

"September 13, 2013

On behalf of the abutters of the proposed Dumpster Depot located at 41 Ashleigh Drive, we respectfully request a re-hearing/reconsideration of the approval that was passed 5-2 at the Planning Board meeting on August 21, 2013. This request is based on the following facts, which we believe to be unlawful, illegal and unreasonable:

1. At the June 19 meeting, the applicant had a chance to speak, as well as the abutters and neighbors. After speaking, the Board went into deliberation. A number of conditions were put in place, particularly the hours of operation and that no full dumpsters would ever be allowed on site. This condition was argued by the applicant, but the Town Administrator was adamant that this condition NOT be removed. If only empty dumpsters were allowed, Tamula stated that would be a deal breaker for his client. According to the approved minutes, the applicant requested further time to look further into this to see if he could or could not run his business with this condition and the proposed hours of M-F 7am-5pm, no Saturdays, no vehicles started up before 6:45 am and no vehicles returned to the property after 6pm. The intent of the extension was for this reason alone. Also in the approved minutes, the engineer said, "These conditions required that the applicant have time to think." The applicant was told, "If you want to operate in Derry, bring back empty dumpsters." The meeting was then adjourned. It was clear this was the only intent to not take a vote that night – the applicant wanted time to think. The applicant, however, was able to come back to the Planning Board, plead his case again, and the conditions were changed. This was wrong as well as unethical. It is

against the RSAs. The applicant addressed new issues and the abutters were not allowed the same right. The neighborhood believed the conditions put in place on June 19 were the conditions – period. The applicant then came back and was able to address changing conditions, with no mention of the time that was supposed to be spent evaluating whether or not he could meet the conditions that the Board had set. Per the chairman, David Granese, “The hearing on August 21 would be continued only to discuss the pending motion and to decide whether to grant approval or not.” The Board was in agreement. The abutters and other town citizens took the board at its word. When the meeting was said and done on August 21, we were all in shock that all the conditions had been changed. (ILLEGAL)

In addition to the above, we believe it should be re-heard based on the following facts:

2. Mr. Tamula quoted from ENV-SW 408.06 which stated the following- “Waste-in-Transit Storage Areas, subject to ENV-SW 408.02, no permit shall be required to temporarily store waste while in transit to an authorized facility provided that: a) the waste shall arrive at the storage facility in covered container(s) to include a waste collection vehicle; b) no waste shall be removed from or added to the container(s) while at the storage facility; c) not more than 150 cubic yards of waste shall be stored at the storage facility; d) the waste shall be stored no longer than 4 days from date of receipt. And then he stopped, and neglected to quote the continuation of this statute which is e) Waste shall not be stored in a manner or for a period of time, which has the potential to result in conditions adversely affecting the environment, public health or safety, conditions that attract insects or vectors, generate odors or leachate, or have the potential to cause fire or explosion. This was an attempt to deceive the board by not reading the statute in its entirety. Mr. Tamula stated that they are considered a Waste-in-Transit. Not only do the full dumpsters have this potential, but also the storage of 350 dumpsters has the same potential. No one can guarantee that these dumpsters will be 100 percent empty. He has already stated on several occasions that they are emptied, not cleaned. Therefore, even one percent of anything left in the dumpsters, crevices, dents, etc. have the potential to result in adverse conditions as stated in ENV-SW 408.6, Section E. These rules apply to a collection storage and transfer facility. A transfer facility is not an appropriate use in Industrial 3 Zoning. (UNLAWFUL)
3. When the applicant went before the Conservation Committee, he stated that “The dumpsters stored on site would be empty. They will be cleaned out at a waste management facility before being returned to the site for storage.” We now know this statement to be false, so the Conservation Commission might wish to weigh in on this. (UNREASONABLE)
4. In May of 2012, the term Contractor’s Yard was removed from the definitions in the Industrial 3 zone. If a contractor’s yard is no longer a valid permitted use in Industrial 3,

and there is no definition of a Contractor's Yard, how can this be approved as a contractor's yard? (ILLEGAL)

5. The Dumpster Depot clearly falls under Industrial District 3 – Section 165-41 B – Prohibited uses. “Any industrial use of land, building, structure, or equipment which would be injurious, noxious or offensive by way of the creation of adverse traffic impacts or conditions, odor fumes, smoke, dust, vibration, noise or other objectionable features or hazardous to the community on account of fire or explosion or any other cause shall be prohibited in this district.” This clearly falls into a prohibited use and should be rejected on this alone. (ILLEGAL)
6. RSA 674.44 and the town's Land Development Control Regulations (LDCR) guard against “conditions detrimental to health, safety and prosperity.” Allowing this on Ashleigh Drive is absolutely detrimental to health, safety and prosperity. (UNREASONABLE)
7. On August 21, the Planning Board was still in deliberation mode. The public hearing was officially closed. At this point, both applicant and abutters were not allowed to speak. However, the applicant was allowed free time to speak as well as answer questions; the abutters were told to remain silent or leave. (ILLEGAL) At this point, the abutters should have been allowed to rebut the information. NOTE: the following information is from a law lecture from the Local Government Center (LGC), which the town of Derry is a member of and they pay for the course for those who attend: “Don't close the public hearing too soon. The board must be certain it has all available necessary information before closing the public hearing and beginning deliberations. This means that, once the board begins to discuss the case, members must resist the temptation to turn to an applicant or an abutter and ask for clarification of a point or additional evidence on an issue. When the public hearing is closed, an abutter or other interested parties has a right to assume that the decision will be made on the basis of record as it stands. It is not fair to invite one party to submit possibly crucial additional evidence without the knowledge of other parties and perhaps an opportunity to respond. [2010- Law Lecture 2]
8. The Planning Board must submit minutes of ALL meetings, including site Walks. There are no published minutes for the site walk on May 11, 2013. (ILLEGAL)
9. On August 21, 2013, the Planning Board illegally changed an existing Zoning Ordinance, specifically 165-23 Buffer Zones. This states “It shall be a minimum of 50 feet.” The Planning Board changed it to 40 feet by allowing the applicant's request. This change requires a workshop, public hearings and finally a move to the Town Council, who would have to go through the same procedure prior to approval. (ILLEGAL)
10. All Planning Board decisions must be by a majority vote of the members present and must be based on a motion that clearly expresses the intent of the board. When Ms. Choiniere was reading her move to accept, she stated “empty dumpsters.” She was interrupted by Mr. Chase who said, “That was removed.” Who is to say that the majority

wanted it removed? Other members clearly stated that they wanted that condition left in.
(UNREASONABLE)

11. In the minutes of the August 21 meeting, the Planning board accepted a new revised plan without holding Public Hearing. (UNREASONABLE)

Respectfully submitted,
Brenda S. Wilson, 4 Greenwich Road.”

Other Business

Mr. Granese advised that he had responses to the items raised in Mrs. Wilson’s letter. They were as follows:

1. Continuation from 6/19 was not just to allow the applicant time to think about the conditions. The Board wanted time to think about the list of conditions – not just a delay to vote the draft list of conditions up or down. From the minutes: “Mr. Anderson stated that in light of the request from the applicant and to allow the Board an opportunity to review the proposed conditions, he would agree to table the action on the conditional grant of approval. Mr. Granese noted it would put this plan out to the August agenda. Mr. Tymula said they had no issues with the extension. Mr. Sioras confirmed the August meeting would fall within the appropriate time frames since jurisdiction had been accepted. The proposed motions would be in the record for the Board to review. Bartkiewicz removed his second and Anderson withdrew his motion. Motion by Anderson to table review of this plan to August 21, 2013, seconded by Bartkiewicz. Discussion followed. Mr. Granese stated that the hearing would be continued only to discuss the pending motion and to decide whether to grant approval or not. There would be no further public input. The Board was in agreement.” Since the motion was withdrawn, it was no longer on the table and technically did not exist. The only thing left was a list of potential conditions as stated by Mr. Anderson and several of the Board members.
2. Regarding DES’ determination the use is a Waste In Transit facility – the original question from the abutters was “did this use require state permits or not/was it a transfer station”. The answer from DES was no permit was required. As a waste in transit facility, so long as they operated within the parameters of a waste in transit facility, they would not be required to be permitted. This is not a transfer station. Transfer stations are facilities such as the town dump.
3. The Conservation Commission has already provided its recommendation to the Board. In fact, three of the conditions of approval (#s 5-7) came from the Conservation Commission.

4. “Contractor’s yard” was previously defined as: “Carpenter shop, plumbing, electrical, roofing, contracting, or similar service establishment.” In June of 2012 the Board amended several definitions in the Zoning Ordinance when it was amending the list of allowed uses in the Industrial IV zone. “Contractors yard” was deleted and became analogous to “commercial service establishment” which was amended at the same time to the following definition. “A building and/or other structure used principally for providing commercial services to the public, such as a barber, hairdresser, health spa, beauty parlor, shoe repair, shoe shine, laundry, laundromat, dry cleaner, photographic studio, catering, express mail/courier, electrician, plumber, repair services, installation service, general contractor, rental shop and businesses providing similar services. This definition does not include a sexually-oriented business.”

The Board did not at this time amend the list of permitted uses in the Industrial III zone and “contractor’s yard” is still listed as a permitted use. Absent a definition for contractor’s yard, the Board looks to the definition of ‘commercial service establishment’ which is an allowed use in IND III and to ‘freight and trucking terminal’ which is also an allowed use in IND III.

5. It does not appear the Board felt that the use fell under the “Nuisance provision” of the Zoning Ordinance or it would have denied the application based on those grounds.
6. Same as above.
7. Since the applicant asked for the continuation, it is disingenuous for anyone to assume they would not speak during the next meeting of the Board. The Board can ask for clarification from the applicant while it is deliberating upon an application. How else can the Board make an informed decision? Mr. Tymula did not present new information, other than to outline what had been updated on the plan. With respect to that, they were all items that had been discussed at previous meetings, or requested previously by the Board (buffer to rear of storage area; fence around storage area; fence around detention pond). The applicant gave their opinions of some of the suggested conditions.

During the same LGC lecture in 2010 (in fact in the very next paragraph of its handout) it is stated “..In complex cases where the public hearing closes late in the evening, there is much to be said for adjourning the meeting and deliberating at the next meeting.” It also says some Board members find it useful to have drafts of motions handy at the next meeting – which is what the Board had. The member packet clearly stated, “(Second) review proposed conditions and determine a revised list of conditions as appropriate.”

8. The minutes of the 5/11/2013 site walk were approved at the 6/05/2013 meeting. They are not on the website but that was an oversight since Mrs. Robidoux was out on leave for a month. If anyone had requested them, they would have been immediately available. We put them on the website as a courtesy – we are not required by law to do so.

Mrs. Choiniere was seated at 7:20 p.m. and Ms. Davison stepped down.

9. There is still a 50 foot buffer between industrial and residential uses, so nothing illegal happened here.
10. Board members did not correct Mr. Chase's statement and had the opportunity to do so. They could have moved to deny based on the fact they wanted only empty dumpsters. Affirmative votes mean the member agrees with the conditions as set forth.
11. Land Development Control Regulations, Section 170-58.D, states "An application which has been submitted to the Planning Department office for submission to the Board, shall not be supplemented, revised or modified after public notice of hearing has been given, except upon vote of the Planning Board at the hearing", which is why the Board voted to accept revised plans before it did anything else.

Other

Mr. Sioras reminded those present of the NH DOT meeting that will be one week from tonight. If anyone signed up for the Law Lecture Series, they would be held at the Derry Municipal Center on October 2nd, 9th and 16th.

Request to Reconsider Decision – Accurate Transport/Dumpster Depot

Mr. O'Connor recused himself.

Mr. Sioras advised the Board has received a request from Brenda Wilson to reconsider its decision on the Dumpster Depot approval. Seven members voted on the application. One of the members who voted yes to approve the application would need to make the motion to reconsider; anyone can second the motion. Then the Board votes the motion up or down.

Motion by Mazzuchelli to reconsider the vote taken at the August 21, 2013 meeting; he agrees with [Mrs. Wilson's] item 7 and he is not totally clear on the procedure. He felt the abutters should have had a chance to speak if the applicant was allowed to speak.

Mr. Granese noted that Mr. Mazzuchelli had sent an email asking the Board to reconsider the vote and he had originally voted yes. He noted there was no second to the motion yet. Mr. Sioras explained the motion will need to be seconded by someone who sat on the application. If there is no second, the motion dies.

Motion seconded by Alongi.

Mr. Granese asked Mr. Sioras what is the procedure? One of the members who voted on the application is not present this evening. Mr. Sioras stated the request is still there. The Board can still vote and the votes would be from the members who were present at the meeting. The

Council liaison cannot be replaced by an alternate, but the Board can still move forward and vote this evening. A vote of “yes” would be a vote to reconsider the plan; a vote of “no” would be to not reconsider the plan.

Chase: stated he went through the list presented by Mrs. Wilson and the plans and came up with the same list read by Mr. Granese. He feels the Board gave due consideration to the application during several public hearings. There were two nights of deliberation and he has thought long and hard about his decision both in and out of chambers. He does not feel reconsideration is warranted at this time. Votes no.

Alongi: votes yes.

Mazzuchelli: votes yes.

Choiniere: agrees with Mr. Chase and votes no.

Bartkiewicz: agrees with Mr. Chase and votes no.

Granese: agrees with Mr. Chase. There were a lot of meetings. The Board did a lot of work. It is an allowed use. He feels the Board did the right thing and made the right decision and followed the laws and procedures that are tasked upon them. Votes no.

The motion failed by a vote of 2-4.

Mr. Sioras said the procedurally, the next step would be for the abutters to go through the appeal process. Both he and Mrs. Robidoux have had discussions with Mr. O'Connor and Mrs. Wilson. The appeal process is to the Zoning Board and eventually to Superior Court as an appeal of the site plan. They are going through the appeal process at that level.

Public Hearing

Mr. O'Connor was reseated.

A SECOND public hearing to discuss proposed amendments to the Town of Derry Zoning Ordinance.

To amend Article II, Word Usage and Definitions, Section 165-5, Definitions, to ADD definitions for Advertising Device, Billboard, Marquee, Sign Permit, Abandoned Sign, Awning Sign, Directional Sign, Digital Sign, Electronic Message Center Sign, Government Sign, Ground Sign, Interactive Digital Sign, Non-Conforming Sign, Official Sign, Off Premise Sign, Political Sign, Residential Neighborhood Identification Sign, Sandwich Board Sign, Special Event Sign, Temporary Sign, Unsafe Sign, Wall Sign, and Warning Sign.

and to AMEND the definitions for Flashing Sign, Projecting Sign, and Window Sign.

To amend Article VI, District Provisions, to repeal the following sections of the Article and to renumber them accordingly: Section 165-32.2.E, General Commercial III; Section 165-34L, Office Business District; Section 165-37G.3, Neighborhood Commercial District; Section 165-45D.2.f, Medium High Density Residential Special Exceptions; Section 165-45.1.C.2.f, Medium High Density Residential II Special Exceptions; Section 165-46B.2.f, Medium Density Residential Special Exceptions; Section 165-46E.5, Medium Density Residential Campgrounds; and Section 165-49H, Traditional Business Overlay District Signs.

To repeal Article XII, Signs and Billboards in its entirety and replace it with the following: Article XII, Signs, Section 165-100, Purpose; Section 165-101, General Provisions; Section 165-101.1, Signs in Residential Districts; Section 165-101.2, Signs in Neighborhood Commercial Districts; Section 165-101.3, Signs in Business, Commercial and Industrial Districts; Section 165-101.4, Signs in the General Commercial III District; Section 165-101.5, Signs in the Traditional Business Overlay District; Section 165-101.6, Campground Signs; Section 165-101.7, Political Signs; Section 165-101.8, Off Premise Signs; Section 165-101.9, Nuisance Signs; Section 165-101.10, Interactive Digital Signs; Section 165-101.11, Electronic Message Center Signs, Section 165-102, Non-Conforming Use Signs, and Section 165-103, (Reserved for Future Use).

Mr. Sioras advised Bob Mackey, the Code Enforcement Officer worked on this with Mrs. Robidoux. He is unable to attend the hearing this evening due to a family emergency. He asked if the Board would consider continuing the hearing to the next meeting so that he could attend. Mr. Mackey had several conversations with a local realtor regarding some changes the realtor would like to see made to the ordinance.

Motion by Bartkiewicz, seconded by Choiniere to continue the public hearing to October 2, 2013.

Chase, Park, Alongi, O'Connor, Mazzuchelli, Choiniere, Bartkiewicz and Granese voted in favor and the motion passed.

Mr. Granese advised the hearing has been continued to October 2nd and there will be no further notice.

Workshop

Livestock Ordinance

Mr. Sioras advised the Animal Control Officer, Marlene Bishop, has provided some input on proposed changes to the Livestock Ordinance. The three acre minimum has been added. He read the changes proposed by the Board at the last workshop for the record.

Section 165-154 has been amended to add a sentence at the end of the paragraph. "Roosters shall be permitted on lots containing a minimum of three acres." Section 165-155 has been

amended to read “At no time shall a nuisance be created that would interfere with nearby property owner’s rights. Exempted from this provision are domestic pets as defined in Section 165-5, Definitions. Roosters shall not be allowed to crow between the hours of 8:00 p.m. and 6:30 a.m.” The Board worked on this ordinance three to four years ago. He asked Mrs. Robidoux to discuss the proposed changes as she has discussed this with Mr. Mackey who worked with the Animal Control Officer.

Mrs. Robidoux noted that the changes on the first document are those that were discussed at the last workshop such as the three acre minimum and the hourly restriction. The other change to the nuisance provision is one that had been discussed when the Board created the ordinance but never made it into the final document. The intent had been to add a little more teeth to Code Enforcement when they went out to investigate these types of complaints. When she and Mr. Mackey discussed this, they thought adding the wording back in might give him the authority to do what he needs to do. The second sheet contains the changes suggested by the Animal Control Officer. They include changes to what is considered livestock. Ms. Bishop was looking for more of a re-write of the entire ordinance. The Board originally excluded swine, sheep, chickens and goats from the provision, but Ms. Bishop would like to see those added. She would like permits to be issued for the slaughtering of animals on small lots and the exclusion of roosters in residential areas. Ms. Bishop has suggested changes to the nuisance provision such that roosters are not allowed at any time to create a nuisance on a condensed property and that animal waste is to be removed in a timely manner to avoid odors or run off issues. Looking at enclosures, she would like livestock owners to be responsible for any damage caused by escaping animals and a provision that small amounts of manure can be used for composting. Ms. Bishop has also suggested adding the following wording, “Anyone who violates the Town Ordinance shall be subject to court procedure after a warning has been given to correct the complaint. Any person or persons residing on lots under the allowed limits will be grandfathered with the exception that once an animal is removed, it cannot be replaced. These are horses, sheep, goats, chicken and pigs, the exceptions to these rules are domestic dogs, cats, reptiles and exotic indoor birds.” Mrs. Robidoux said it would be up to the Board if it wanted to focus solely on the roosters or did they want to go back and look at the whole ordinance again?

The Board discussed the proposed changes. Mr. Granese was not sure what “residential areas” meant. Mrs. Choiniere was not sure what was meant by “condensed area”. The Board members wondered how someone could keep a rooster from crowing? Mr. O’Connor and Mr. Park said with a low roof to keep them from crowing and keep them in the dark. Mr. O’Connor concurred with the 8:00 p.m. to 6:30 a.m. provision and then discussed the three acre minimum. He questioned the acreage restriction. If someone had a hen house 20 feet from the property line, they might have it in that location regardless of how much land they had. The three acre minimum would not do anything. If someone has three acres, who is going to determine where the hen house is going to go? Also, when children purchase eggs, it is impossible to tell if an egg contains a rooster until it hatches and is about five weeks old. If roosters are not allowed, how will it affect the children who have waited for that egg to hatch?

Mr. Chase commented the Board is talking about roosters or “livestock” when there are far more dogs that bark at night. Last night during the Town Council meeting, a resident complained

about the rooster that made his dog bark at night. If the Board discussed one type of animal, it should discuss all types.

Mr. O'Connor noted he has reviewed the Charter and the Ordinances and there is no noise nuisance ordinance. Does the Board have a right to create one when there is no definition of nuisance?

Ms. Davison asked with regard to nuisance. Does that have anything to do with what the livestock might attract to the property such as fox and other animals which can be a health hazard? Mr. O'Connor said that has not been an issue in the past. People are supposed to contain their livestock. The Board has the best definition of livestock it could find. Mr. O'Connor, Ann Evans and Robin Bordonaro worked on the original ordinance.

Mr. Granese said he liked the Board's proposed change to the nuisance section; he feels it covers it all. Noise is hard to enforce because it is not termed "disturbing the peace". Mrs. Choiniere recalled this ordinance was originally much larger when first submitted and had been pared down. There had been something in the original draft about dogs.

Mr. Granese said he wished Mr. Mackey was here to provide input this evening. Mr. Sioras suggested taking the workshop back up at the October 2nd meeting. Mr. O'Connor felt if the Animal Control Officer could not be at the meeting, it would be helpful to know how she handled barking dog complaints. Mr. Sioras said Ms. Bishop had been talking to Mr. Mackey and he would have insight on that. Mr. O'Connor said there were State RSAs for dog complaints. Mr. Granese felt if the livestock ordinance was discussed in a workshop on October 2nd, it would give the Board members more time to review. The Board opted to continue discussion of the livestock ordinance to October 2nd.

Motion by Bartkiewicz, seconded by Choiniere to adjourn. The motion passed with all in favor and the meeting stood adjourned at 7:51 p.m.

Approved by: _____
Chairman/Vice Chairman

Secretary

Approval date: _____